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Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON, LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF STATE OF WISCONSIN AS AMICUS CURIAE

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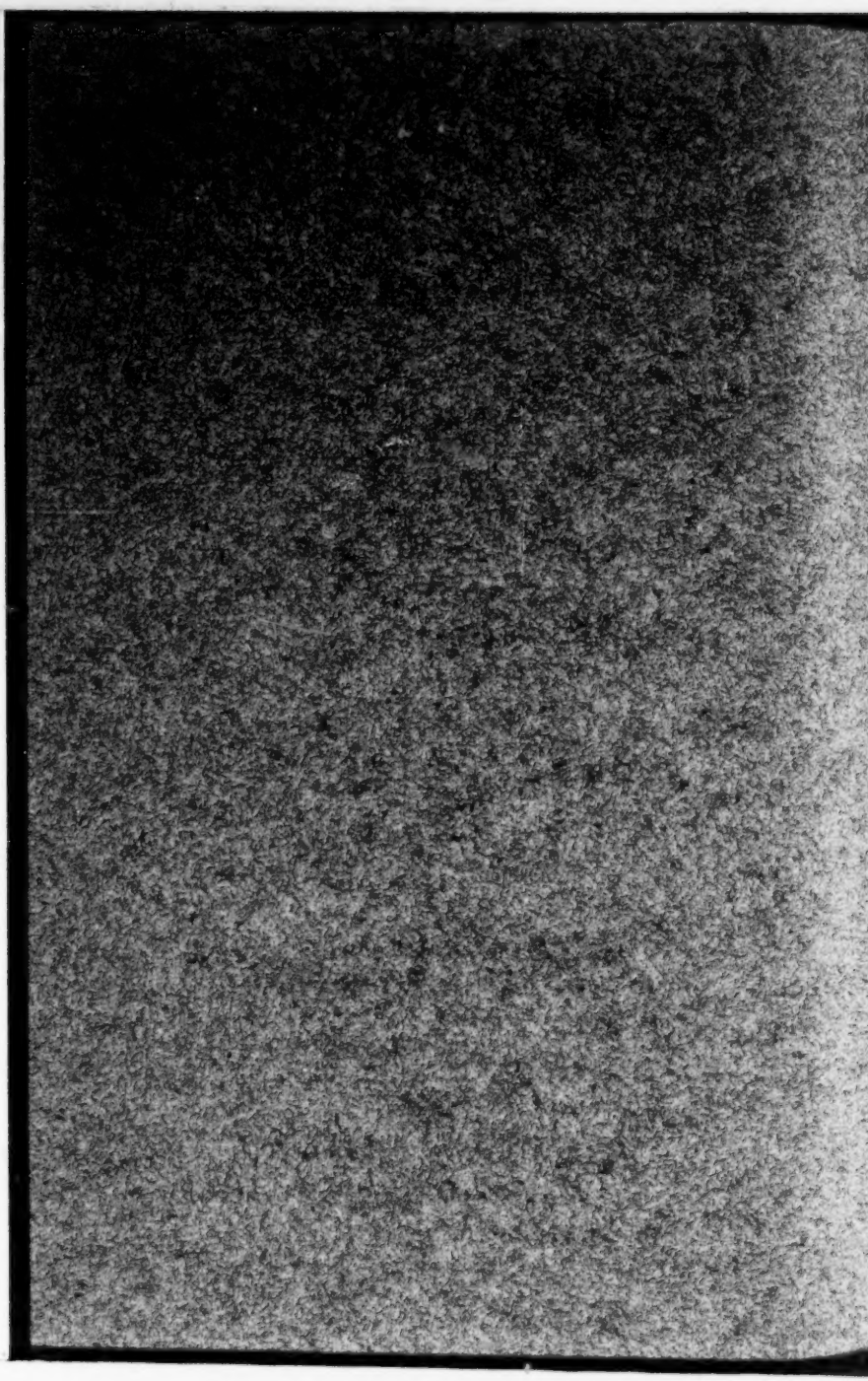

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INTRODUCTORY STATEMENT

The judgment of Wisconsin Supreme Court appealed from held that plaintiff herein was not entitled to secure a priority by garnishment on assets in the hands of assignees under a voluntary assignment for benefit of creditors executed on March 23, 1931 by the Joseph M. Boyd Company, a Wisconsin corporation. In so holding, the Wisconsin Supreme Court upheld as in force that part of Section 128.06 Wisconsin Statutes, 1929, which was created by

Chapter 334, Laws of 1897. That provision precludes a creditor by attachment or garnishment (as here) securing any priority or advantage over other creditors where the debtor (as here) has attempted to make a voluntary assignment but has failed to comply with the requirements which up to the time of this amendment (of 1897) had under the state law been mandatory to the validity (as to creditors) of a voluntary assignment. Up to the time of this amendment, it had been held that failure to file bond in amount equal to assets rendered the assignment void as to creditors. Up to the time of this amendment, a creditor could secure priority by garnishment in such a case. This amendment (in 1897) to Sec. 128.06 (then Sec. 1694 of the Statutes) simply denied the remedy of garnishment in such cases and modified the rule as to the requirements so as to make them directory only.

We feel that the state clearly has the right to encourage voluntary assignments, to regulate them, and to deny the remedy of garnishment where the debtor has honestly attempted to make an assignment for the benefit of his creditors. It is not even claimed that to deny garnishment in such a case is discriminatory or invalid as in violation of the 14th amendment. The policy of the State of Wisconsin is not to permit the use of its own state remedy of garnishment to secure a priority where in good faith a voluntary assignment has been made for the benefit of creditors. The state which created the remedy may, we believe, modify or withhold it. But it is claimed by appellant here that, because the statute also provides for execution and administration of the voluntary assignment according to the law of this state, the entire voluntary assignment law (including this provision against the securing of priority by garnishment or attachment) must be accepted as a unit and as a unit held suspended. This is indeed a broad and

revolutionary contention and one in which the State of Wisconsin has a vital interest.

The judgment below simply denies plaintiff a remedy which plaintiff cannot now have under the state law. The policy of the law used to be to recognize a priority gained by the so-called 'diligent creditor' regardless of what may happen either to the business of the debtor or other creditors. The present policy of the state as it has existed for many years and as exemplified by the section of the statutes here in question, is different. The state seeks to encourage voluntary assignments for the benefit of all creditors and to encourage cooperation between creditor and debtor. The State of Wisconsin is vitally interested in maintaining the validity of this law which denies the use of garnishment to gain priority in such cases; it is also vitally interested in preserving the right of a debtor in Wisconsin to make a voluntary assignment in honest cooperation with his creditors and in maintaining the right of the state legislature and the state courts to regulate and control the execution of such a trust where there has been no proceeding taken to bring the case under the jurisdiction of the bankruptcy courts. The state statutes are applicable whether the assignor be solvent or insolvent and where no discharge is contemplated or provided for.

The State of Wisconsin recognizes that the National Bankruptcy Act makes a voluntary assignment an act of bankruptcy. If the assignment is unfavorable or unfair to creditors then creditors sufficient in number and amount can readily transfer the whole matter to the Federal courts. But by the very fact that it declares an assignment for the benefit of creditors to be only an act of bankruptcy, the National Congress has recognized that there is a proper field for state administration and regulation of such assignments. In the present case the assignor has not stipulated for or applied for any discharge. No creditor by

accepting a dividend binds himself to a discharge. No action by him is barred or suspended as against the debtor but the property transferred is in a trust created by the voluntary act of the debtor. No involuntary proceeding and no discharge is needed or in any way involved. The assignment is made and the regulatory provisions here in question apply regardless of whether the assignor is solvent or insolvent. Such assignments and distribution among creditors in accordance therewith without discharge are widely used, have never been considered in fact as invading the field of the bankruptcy law and present a broad and useful field for state administration which the State of Wisconsin considers is of vital importance to preserve.

There are a great many such proceedings pending in Wisconsin today, the validity of which is challenged by the broad claim of appellant in this case that any law providing for the equitable distribution of the assets of a debtor, who may be shown to be insolvent, is a bankruptcy law invading the field of the National Act. There are a great many such proceedings pending in which a just and fair distribution of assets would be defeated by a holding that the part of Section 128.06 here in question is suspended.

For many years debtors and creditors in Wisconsin have availed themselves of voluntary assignments. This has been true though the debtor did not know whether or not he was insolvent, also where the debtor believes himself solvent and also where he knows he is insolvent. In many of these assignments (see *Mayfield Woolen Mills v. Goodrich & Martineau Co.*, 189 Wis. 406 (1926)) the assignment provided, as here, for a continuance of the business. Such provisions are extremely valuable and beneficial as tending to preserve good will and the value of the business. Voluntary assignments have been a valuable means of avoiding the stigma of bankruptcy, many times preserving solvency. Though the assignor may be found to be insolvent,

insolvency is of course not a requisite to a voluntary assignment nor to the regulation and administration thereof under Wisconsin Statutes, Ch. 128.

The State of Wisconsin is vitally interested in preserving its own proper legislation and jurisdiction and its own control over the remedy of garnishment in that state. It is also vitally interested in preserving other remedies such as creditors' sequestration actions against corporations where the property of the corporation is applied to the payment of its debts. (Secs. 286.10 et seq. Wis. Stats. 1931) Such proceedings may be maintained by any judgment creditor whose execution has been returned unsatisfied and the court restrains other creditors from securing priority. In these proceedings notice is given to creditors and assets distributed. If the position of appellant in this case is sound, then all such proceedings must fall since in all of them an equitable distribution of assets among creditors under a state statute and in the state courts is accomplished.

The State of Wisconsin feels that the field of bankruptcy under the Federal Constitution and as involved in the present Federal Bankruptcy Law should not be extended by construction to prohibit state provisions as to voluntary assignments which do not involve any discharge and are not limited to insolvents. The Bankruptcy Act has never been so construed in practice. There has been built up a widespread and valuable use of voluntary assignments; and at least in the absence of a clear mandate from Congress the State of Wisconsin feels that there is no substantial ground or reason for holding that the Bankruptcy Law covers this field. No doubt this case would never have arisen were it not for some language in the case of *International Shoe Co. v. Pinkus,* 278 U. S. 261 which we believe has by appellant here been given a construction never intended in that case. The

State of Wisconsin regards the question here presented as of vital importance to it and its citizens and hence has asked and obtained leave to file this brief as a friend of the court.

Misconception of Position of Supreme Court of Wisconsin by appellant in this case.

We think appellant in this case has not correctly interpreted the position of the Wisconsin Supreme Court in this case. At page 18 of Appellant's Brief, it is stated that the Wisconsin court has held the entire Chapter 334, Laws of 1897 to be valid and in force and effect. At page 51 of Appellant's brief it is claimed the Wisconsin court has not treated any part of Ch. 334, Laws of 1897 as severable but held it valid and in force in toto.

This is we submit, with much respect, an absurd construction of the decision of the Wisconsin Supreme Court. It is quite obvious from its opinion that the Wisconsin Supreme Court stated in substance that the provisions of Sec. 128.06 (here involved) *were separable* from the provisions of 128.08 (relating to involuntary proceedings and discharge) although both the part of 128.06 here in question and 128.08 were introduced into the statutes by Ch. 334, Laws of 1897. Obviously the Wisconsin Supreme Court has not held here or in any other case that Sec. 128.08 created by Ch. 334, Laws of 1897 is in force *in toto*. The reference to Ch. 334, Laws of 1897 as valid in the opinion of Wisconsin State Court herein is obviously to the saving clause of Sec. 128.06 here in question created by Ch. 334 Laws of 1897 and as applied to voluntary assignments. Thus the Supreme Court in present case said: (Trans. of Record, pp 41–42)

> "Various contentions are made by the parties in the carefully prepared briefs submitted by them, but in the view we take of this case but two questions require determination.

1. May the provisions of ch. 128, which pertinently relate to voluntary assignments for the benefit of creditors, be severed from the other provisions of said chapter which concededly amount to insolvency proceedings, in that they provide for the discharge of insolvent debtors?

2. If the provisions of ch. 128 regulating voluntary assignments for the benefit of creditors may be severed from the other provisions of said chapter, then are such provisions relating to such assignments for the benefit of creditors, suspended so long as the Federal Bankruptcy Act shall be in force and effect, because in conflict therewith?"

The court then refers to In re Voluntary Assignment of Tarnowski, 191 Wis. 279, 210 N. W. 836 and to other Wisconsin decisions to which we shall hereinafter refer (on this question of severability) and comes to following conclusion: (R. 42)

> "There exists in our minds no question as to the plain duty of this court to construe the several provisions of ch. 128, relating to assignments for the benefit of creditors, *as separate and distinct* from the other provisions of said chapter relating to the discharge of insolvent debtors." (Italics ours)

Obviously the above takes the parts of the law relating to assignments introduced by Ch. 334, Laws of 1897 and treats them as separable from insolvency and discharge features of Chapter 128 including such features *as were introduced in 1897*. Obviously the court did not intend to treat differently discharge provisions introduced by the Act of 1897 from discharge features introduced by prior enactments.

As a final conclusion the court said: (R. 51–2)

> "that ch. 334 of the laws of 1897, constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees, even

though the assignment would otherwise be void *but for such saving clause.* The judgment of the circuit court must, for the reasons stated, be reversed." (Italics ours)

Plainly the court was referring to the part of Ch. 334, of the laws of 1897 which is *"the saving clause"* added to Sec. 128.06 (there Sec. 1694). It had no intention to declare Ch. 334, Laws of 1897 valid and in force *in toto.* It is clear the court held such saving clause as a part of Sec. 128.06 relating to voluntary assignments was separable from the other provisions of Ch. 128 relating to insolvency and discharge *whatever or whenever may have been the source of such provisions.* This is made the more obvious by the court's own entire summary of its conclusions as follows. (R. 51–2)

> "We conclude, therefore, that the provisions of ch. 128, relating to voluntary assignments for the benefit of creditors are properly severable from the remaining sections of said chapter; that so severed they are not in conflict with the Federal Bankruptcy Act; that an assignment for the benefit of creditors is an act of bankruptcy and all proceedings in the state court might be superseded by the federal bankruptcy act when the jurisdiction of the federal court is properly and in a timely manner invoked; that ch. 334 of the laws of 1897, constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees, even though the assignment would otherwise be void *but for such saving clause.* The judgment of the circuit court must, for the reasons stated, be reversed." (Italics ours)

The court in this case therefore clearly separated Section 128.06 with the saving clause here in question relating to garnishments and voluntary assignments from the features of Sec. 128.08 and succeeding sections relating to involuntary proceedings against an insolvent and discharge.

But this same separation had been made by prior Wisconsin decisions and the separation has been recognized and applied for many years in Wisconsin.

And in making the separation by decision and in practice and in leaving such practice undisturbed by further legislative action Wisconsin has relied on the repeated decisions of this court interpreting the bankruptcy act in accord with the very distinction and separation which has been recognized and applied in Wisconsin. These decisions of this court have repeatedly been applied and recognized by our supreme court and are followed in the very separation of provisions which is accepted by the decision here under review. How clearly the separation between provisions as to voluntary assignments of debtors (whether they be solvent or insolvent) and provisions relating to involuntary proceedings and to discharge in any case has been made in Wisconsin is shown by a further review of the statute and decisions. We refer only to some additional considerations and do not propose to cover the same ground as respondent's brief in which we fully concur.

The statute here in question Sec. 128.06 Wisconsin Statutes of 1929 (in force at time of assignment for benefit of creditors here in question) provides as follows:

> "All voluntary assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys or effects for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such assignor or some one of the assignors at the time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed

to the clerk of the circuit court of the county by his name of office as obligee in a sum not less than the present value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignors, with two or more sufficient sureties, freeholders of this state, who shall each testify to his responsibility and by their several affidavits satisfy the officer taking such bond that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein; and the bond shall be conditioned that such assignee shall faithfully discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties, then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. *But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void, but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the as-*

signee or by any receiver of said property and estate appointed as hereinafter provided." (The part in italics was introduced by Chapter 334, Laws of 1897 which also created some other sections hereinafter referred to.)

The assignor here does not challenge the assignment as not carrying out its intent. The assignment made after this law incorporates the separable enforceable provisions but leaves out suspended provisions.

The assignment here in question was made with full knowledge of above provisions and with full knowledge that only so much of our statutes as did not conflict with the bankruptcy law remain unsuspended. Also with full knowledge *and the right to assume* that all provisions of Chapter 128 including the above provision were not and are not suspended unless in conflict with the federal act. The assignor, a resident of Wisconsin, and a Wisconsin corporation, had the right to execute an assignment without filing bond and without filing inventory as originally prescribed and made mandatory by Sec. 128.06 Wis. Statutes (before the amendment of Chapter 334, Laws of 1897) knowing that by so doing it would prevent any one creditor from securing a valid priority by garnishment and also knowing that in the administration of said assignment such provisions and only such of state law would be applicable as are not suspended by the Federal law.

In *Voluntary Assignment* of *Tarnowski*, 191 Wis. 279 (1926), it had been held that a creditor voluntarily participating in a voluntary assignment proceeding in the state court under Chapter 128 and receiving dividends *did not* thereby consent to the discharge of the debtor under any provision of Chapter 128 providing for a discharge, although the debtor asked for a discharge in that case. *It was held that the creditor by his consent and participation*

must be deemed to have consented to have applied only such provisions as were not suspended. **The court held that the provisions of Chapter 128 relating to voluntary assignments and their administration were not suspended and by these he was bound. It held that provisions as to a discharge of voluntary assignor were suspended.**

The court said:

> "In this case *Tarnowski* made a voluntary assignment for the benefit of his creditors. In order for the creditors to have the benefit of the assignment, it was necessary for them to file and prove up their claims. This by reason of the statutory provisions regulating voluntary assignments. As the voluntary assignment was for the benefit of creditors, and as each creditor was entitled to his *pro rata* share of the estate, a creditor incurs no penalties or forfeitures by complying with statutory regulations necessary to enable him to acquire his *pro rata* share, except such penalties and forfeitures as are prescribed by the regulations themselves. As the statute providing for a discharge of the debtor is no part of the regulations governing voluntary assignments for the benefit of creditors, it follows that the appellant did not waive its right to object to the discharge of the debtor by filing its claim or accepting its *pro rata* share of the proceeds of the estate."

Obviously the above squarely held that all discharge features of the law including those in the separate sections created by Ch. 334, Laws of 1897 were suspended.

It was just as arguable in that case as in the present case that the discharge features constituted a part of the consideration for the regulations as to assignments. And at the time of the assignment there involved Sec. 128.08 Wisconsin Statutes 1929 providing for involuntary proceedings in certain cases of preference was in the statutes and contained the provision for a discharge. Obviously in

that case such section was not regarded as an inseparable part of the chapter relating to voluntary assignments. If it was an inseparable part then it must have condemned the whole chapter just as much as it could now condemn Section 128.06.

Separability of part of statute here in question clearly established by Wisconsin decisions which in turn directly followed decisions of this court.

But the separability of Section 128.08 as to involuntary proceedings and its provisions for a discharge from Section 128.06 maintaining the validity of good faith assignments without compliance with all the requirements of the section is further shown by other important considerations.

By Chapter 334, Laws of 1897 the present section 128.06 (and which up to that time declared that a voluntary assignment should be void *as to creditors* if bond not filed or certain other requirements not observed) was amended so as to add the part above quoted in italics (p. 10 supra).

It will be noted that this provision could be fully carried out without resorting to any discharge and without resorting to any involuntary proceedings of any kind if provisions for discharge or for such proceedings should be suspended.

It will be noted that the discharge provisions contained in sections *128.19* Stats. 1929 et seq., were in 1897 in the statutes and were not suspended because there was then no bankruptcy act. In 1889 (Ch. 283 Laws of 1889) these discharge provisions had been enacted applicable to "any person who shall have made a voluntary assignment for benefit of creditors". In 1889 there was no Federal Bankruptcy Law.

By Chapter 334 of Laws of 1897 in addition to above amendment which prevented an assignment being void as to creditors for failure to file bond, inventory or other

defects and avoided any attempt to secure priority by garnishment (as here) after assignment, two additional sections were created:—

Sec. 1694a (Stats. 1898) (now Sec. 128.07) as follows:

> "Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, or a garnishment is made against such a debtor, such debtor may, within ten days thereafter, make an assignment of all his property and estate not exempt by law, for the equal benefit of all his creditors as provided by law, whereupon all such attachments, levies, garnishments, or other process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver."

It will be seen that above was a separate provision invalidating garnishments within 10 days *prior* to an assignment. This section is in no way made dependent on any discharge provision in any subsequent section, is in no way dependent on any provision for an involuntary proceeding against an insolvent and while made a part of the regulations as to voluntary assignments is a separable part because it deals with garnishment prior to the time of the assignment.

In addition, the same Chapter 334 of Laws of 1897 created a separate section providing for involuntary proceedings and providing for a discharge *"the same as in voluntary assignments"*. This section (now Sec. 128.08) was as follows:

> "When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby any one or more of his creditors shall obtain a preference over any other of his creditors, or shall omit to do any act which he might lawfully do to prevent any of his c reditors from obtaining preference over his other creditors, contrary to the intent of this act, or if he shall not, within ten days after any levy

by attachment, execution or garnishment made against him, make an assignment of all his property as provided in the next foregoing section of this act, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy, or defend against the said levy, *then, or within thirty days* thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate amount, may make a petition to the circuit court, or a judge thereof, in the county or circuit where such debtor resides, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct, to the debtor and creditors sought to be preferred, or to their attorney of record, of the time and place of hearing, the court in the term time, or a judge in vacation, shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent, or has been giving or is about to give a preference to any of his creditors over other of his creditors, or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action, and estates of every kind of the debtor, including property attached or levied upon or garnisheed in the manner and subject to the limitations herein provided, and of all property conveyed in violation of the provisions of this act, and have charge and control of the same, and of all debts or property garnisheed, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due, who shall prove their claims within such time and manner as the court or judge shall direct, and the court or judge shall order the debtor to file a correct inventory of his assets and

a list of his creditors as provided in section 1697, of the revised statutes of the state of Wisconsin for the year 1878; such receiver shall be appointed and all proceedings shall be had under the provisions of the laws of this state relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this act into effect. The provisions of this act shall not apply to any payment or satisfaction, in whole or in part, of a past due debt made in the usual course of business without any intent on the part of the creditor to evade the provisions of this act. ***The same proceedings may be taken, and with like effect, under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said insolvent debtor had made a voluntary assignment pursuant to the provisions of Chapter 80 of the revised statutes of Wisconsin for the year 1878.''*** (Italics ours)

The above section was enacted in 1897 when there was no bankruptcy act just as the discharge features of what are now Sections 128.19 and following were enacted as to voluntary assignments in 1889 when there was no national bankruptcy act. The provisions of this section (128.08) (referring to involuntary proceedings and discharge therein) as enacted in 1897 were even more clearly separable from the preceding sections (relating exclusively to voluntary assignments) than were the discharge provisions of 1889 which obviously applied only to cases of voluntary assignments. This section 128.08 simply applied by way of analogy the provisions as to distribution and discharge in voluntary assignments to involuntary proceedings. This section (Sec. 128.08) and the two following sections are the only sections in the entire chapter (Ch. 128) which relate to involuntary proceedings. Section 128.08 is clearly separable in its subject matter. The fact that it, as well as the provisions enacted in 1889 as to discharge, were

enacted when no national bankruptcy act was in force does not show that the legislature contemplated that if a Federal law were enacted all the provisions as to voluntary assignments should fall. Previous decisions of the United States Supreme Court had indicated under the prior Bankruptcy Law that only provisions involving a discharge would be suspended and that administration of voluntary assignments and distribution under them by state courts were valid and not suspended. The legislature of 1897, the same as the legislature of 1889, had the right to assume that in the event of a Federal Bankruptcy Act all assignment features would remain but that discharge provisions would be suspended. The legislature of 1897 thus had the right to contemplate and undoubtedly did contemplate that section 128.08 could be suspended without at all disturbing the enforcement of 128.06.

And in 1899 after the enactment of the Federal Bankruptcy Law of July 1, 1898 there arose in Wisconsin a case in which it was squarely held that what is now Section 128.07 and which was created by Chap. 334, Laws of 1897 was valid and in force although the discharge provisions in Sec. 128.08 were suspended.

The case was *Binder v. McDonald,* 106 Wis. 332. In that case on August 1, 1899 the Wittenberg Veneer & Panel Co., a Wisconsin corporation made a voluntary assignment which was 3 days after an attachment. The trial court held that Section 1694a (now 128.07) (and which invalidated attachments within 10 days prior to the assignment) was invalid because as a part of Chapter 80, Statutes of 1898 (now Chapter 128) it was suspended by the Federal Bankruptcy Act. But the supreme court of the State held otherwise. The court said: (p. 340)

> "Perhaps the learned trial judge was induced to decide as he did by reason of certain expressions found in some of the decisions of this court from which it

might be inferred that the whole of ch. 80, Stats. 1898, is to be regarded as an insolvent law. *Holton v. Burton,* 78 Wis. 326; *Second Ward S. Bank v. Schranck,* 97 Wis. 258. Such was not the intention. What is thus stated in those cases must be regarded *as relating to the insolvency features of that statute.* The right to make such voluntary assignment for the benefit of creditors, when not forbidden by statute, is inherent in a corporation as well as an individual and existed independent of the insolvency features of that chapter. *Vanderpool v. Gorman,* 140 N. Y. 563; *Garden City B. & T. Co. v. Geilfuss,* 86 Wis. 612." (Italics ours)

The court further said: (p. 339)

"Here the plaintiff, under the state law, seized property of its debtor on an attachment. Four days afterwards the debtor, under the state statute, made a voluntary assignment for the benefit of its creditors. Thereupon the assignee under the statute cited moved to dissolve the attachment, and the court held that it had no power to decide the question, even in the absence of any proceedings in bankruptcy. *Although the making of the assignment was an act of bankruptcy, avoidable by proceedings in bankruptcy, yet, in our judgment, neither that assignment nor the motion to dissolve the attachment was a matter or proceeding in bankruptcy within the meaning of the federal statutes and the federal adjudications cited.*" (Italics ours)

It was squarely held in above case that the attachment should be declared void under the provisions of what is now 128.07 in spite of the fact that what is now Sec. 128.08 was enacted at the same time as Sec. 128.07 (that is in Chapter 334, Laws of 1899).

In the above case of *Binder v. McDonald,* 106 Wis. 332 at 337 the court said as to the decisions of this court:

"Pending the bankrupt act of 1867, it was held by that court that 'an assignment by an insolvent debtor

of his property to trustees for the equal and common benefit of all his creditors is not fraudulent, and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.' *Mayer v. Hellman,* 91 U. S. 496."

Mayer v. Hellman, 91 U. S. 496 has never been overruled or questioned by this court and it was also followed in the decision of the Supreme Court of Wisconsin from which this appeal is taken. It is apparent that in *Binder v. McDonald,* 106 Wis. 332 the provisions of 128.08 insofar as covering the field of the bankruptcy law were treated as separable and suspended.

It is true that in 1921 the Wisconsin Legislature in enacting a revisor's bill, left all of the present chapter 128 out of the statutes. This is commented on at p. 11 of Appellant's brief as indicating a view that Section 128.06 should be deemed suspended. But obviously the act of the legislature was due to the individual opinion of the then revisor that (contrary to the decisions in the Supreme Court of Wisconsin and of this court) the whole chapter was suspended. The provision in question occurred in a long revisor's bill (Ch. 590 Laws of 1921) and could not have attracted any special legislative attention.

But the error was promptly corrected by the next legislature by passing a special bill (Ch. 132 Laws of 1923) providing that chapter 80 (now Ch. 128) should be restored into the statutes and printed as such.

Obviously the legislature realized that parts of the chapter were suspended. The action of the legislature must be construed as indicating that every part which could stand consistently with the National Bankruptcy Act should be in force. It cannot be assumed the legislature was ig-

norant of the decisions of the Supreme Court of Wisconsin and of this court. Accordingly this act of the legislature of 1923 strongly supports the separable character of every provision consistent with the Federal Act. Certainly the legislature did not intend the respective provisions must fall altogether as claimed by counsel for appellant here.

At page 12 of appellant's brief counsel states he has been informed by *someone* in the legislative reference library of Wisconsin that a certain assemblyman was the author of Chapter 132 of the Laws of 1923 and that *he* desired the enactment for certain purposes. Clearly such alleged information whether authentic or not is not entitled to the slightest consideration. The intent of the individual *author* of the bill is of course immaterial even if it could be ascertained according to the dubious method employed by counsel. But the apparent intent of the legislature which could only be to preserve every part of the statute which could stand is of the utmost importance.

In view of the fact that our own courts had already held Section 128.07 (which resembles and is directly connected with the subject matter of 128.06) as separable from the suspended provisions of 128.08, this court should certainly follow the Wisconsin Supreme Court in holding that Section 128.06 is in force regardless of whether 128.08 is in part or even entirely suspended. In Wisconsin the uniform practice has been to administer voluntary assignments under 128.06 and related sections and not to have proceedings under Sec. 128.08. The legislature has shown no disposition to change the result reached by the decisions of our Supreme Court or to disturb the existing practice.

In *Segnitz v. Garden City Banking & Trust Co.*, 107 Wis. 171 the assignment was made *before the Federal Bankruptcy Act of 1898 went into effect.* The question was whether the assignment was binding as to Illinois property

and Illinois creditors. It was held not and it was held that *at the time* of the assignment *the discharge features were in force* and therefore the assignment could not operate extra-territorially. The court said: (p. 176–177)

> "We are satisfied with the proposition that *when* this assignment was made *the bankrupt features* of our law *were in force* and the deed of assignment did not carry title to the personal assets of the assignor in Illinois,—at least, not as against creditors residing in that state. Such being the case, the defendant had a right, after the assignor's notes became due, to apply the money in its hands, *pro tanto*, to their satisfaction." (Italics ours)

Of course an assignment made after the discharge features of the state law were suspended by the Federal Act would stand on an entirely different footing since the assignor does not require the application of suspended parts and this is the established view of the effect of of the assignment as held in Tarnowski Case 191 Wis. 279.

In *Duryea v. Muse*, 117 Wis. 399 (1903) the court held that *the present section 128.06* was in force notwithstanding the bankruptcy act. It appeared no steps had been taken to enforce the assignment for the benefit of all creditors under the saving clause at end of Section 128.06 (see p. 402). The court held the assignment was invalid as failing to comply with 128.06 as to residence of assignee within state and bond and sustained judgment for plaintiff. This was done on the express ground that Sec. 128.06 was in force regardless of other provisions of Chapter 80 (now 128) the court saying, p. 406:

> "As briefly indicated in *Binder v. McDonald*, 106 Wis. 332 (5), 340, 82 N. W. 156, only 'the insolvency features' of ch. 80, Stats. 1898, are 'to be regarded as an insolvency law.' In that case it was held that, as there had been no proceedings in bankruptcy under the federal act, the state court had jurisdiction to deter-

> **mine a motion by the assignee under *sec. 1694a (now 128.07)* Stats. 1898, to dissolve an attachment levied within ten days prior to the making of a voluntary assignment. *As already indicated, that section did not include any of the insolvency features of ch. 80, Stats. 1898, but only related to enforcing the assignment.* So it is true that the *portion of sec. 1694,* Stats. 1898, above quoted, only relates to the execution of assignments; and hence it was not *ipso facto* suspended by the passage of the federal bankrupt law." (Italics ours)**

The "portion" of Sec. 1694 above referred to is the very saving clause here in question as a part of 128.06 and was thus clearly treated as separate from the insolvency and discharge features of 128.08.

Section 128.06 (then Sec. 1694 Stats. 1898) declares only that the assignment is valid to insure distribution equally even though certain requirements are not complied with. The legislature which imposed the requirements clearly had the power to provide they should be directory only and that the assignment executed in good faith would be effectual to secure distribution according to the statutes regardless of such defects. The assignor in making the assignment knows the statute and distribution, knows there can be no discharge and transfers his property for the distribution by his voluntary act. The assignor is in no way here attacking the assignment as involuntary. A creditor simply attacks it as void as to him and seeks in order to secure a priority to enforce a state remedy expressly denied him by the law of the state which is entitled to regulate the extent and application of that remedy.

In *Gilbert Paper Co. v. Whiting Paper Co.,* 123 Wis. 472, the court held the attempted garnishment invalid saying: (p. 478-9)

> "The rule of the above-cited void assignment for creditors cases would, of course, sustain the garnishment here, but for new legislation prohibiting such

procedure. After the decision of most of those cases the legislature enacted:

> 'No creditors shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of insolvency of any debtor, by attachment, garnishment or otherwise obtain priority over other creditors upon such assignment being for any reason adjudged void.' Sec. 2, ch. 334, Laws of 1897.

We can entertain no doubt that this legislation was aimed directly at the rule laid down in *Winner v. Hoyt, supra,* and following cases, that property attempted to be conveyed by a void voluntary assignment could be seized by any individual creditor by attachment or garnishment. Indeed, its words are too plain to invite or permit attempt to construe it upon that subject. We can but enforce it. We are aware that in *Duryea v. Muse,* 117 Wis. 399, 94 N. W. 365, subsequent to 1897, a garnishment was sustained against the assignee under a void voluntary assignment upon authority of the earlier cases. The court did not, in its opinion, at all discuss or consider the force of this legislation of 1897. It did not expressly deny it effect. If, however, it did so by implication, in sustaining the garnishment notwithstanding such statute existed and was called to our attention in the briefs, that implied denial must be deemed overruled."

In *Mayfield Woolen Mills v. Goodrich & Martineau Co.,* 189 Wis. 406 (1926) it was held that an execution by a judgment creditor was not valid as against property in hands of an assignee under a voluntary assignment although the voluntary assignment was practically same as here.

The court said: (p. 407)

> "From the stipulation it appears that the defendant, *Goodrich & Martineau Company,* a Wisconsin corporation, being unable to meet the financial demands

against it *although claiming to be solvent*, on September 3, 1924, made, executed, and delivered to three trustees an assignment of all of its property, real and personal, for the benefit of its creditors. The instrument did not comply with the statutes on voluntary assignments and was more in the nature of a common-law assignment. It was not, in some minor respects, non-preferential, because it authorized the trustees to liquidate and settle certain claims not exceeding $50 in amount. *It did not contemplate the general liquidation of the estate of the assignor, but, on the contrary, included a scheme whereby such estate might be administered for a period of three years under the terms and conditions of the instrument of assignment and the payment of the claims of creditors during that period.* Further, the trustees were authorized to continue the business in its ordinary course, and to accomplish this end they were invested with broad general powers. The assignment was not filed in the office of the clerk of the circuit court and the trustees were not required to furnish a bond." (Italics ours)

The court also said: (p. 408)

"Voluntary assignments did not originate pursuant to statute, but were recognized by the common law at an early period of its history. Statutes upon the subject are merely regulatory. At common law they were made both with and without preferences, and in either event they were valid. Preferences were even permitted under our own statutes at an early date. The voluntary assignment statutes as they appear in the Statutes of 1898 provide for an administration of the debtor's property for the ratable benefit of all his creditors under the direction of the court. Prior to the enactment of ch. 334 of the Laws of 1897, a failure to comply with the provisions of the statute on voluntary assignments in the respects therein indicated voided the assignment and subjected the debtor's property in the hands of the assignee to seizure on execution, or attachment, and the property in the

hands of the assignee was also subject to garnishment."

The court also said: (p. 411)

> "It has been held that 'an assignment by a debtor in no way affects the rights of his creditor to begin and prosecute to judgment a suit to recover his demand. It is immaterial whether the suit is begun before or after the assignment or whether the creditor has filed his claim with the assignee or not.' *Smith v. St. Paul German F. Ins. Co.* 56 Minn. 202, 57 N. W. 475; *Parsons v. Clark,* 59 Mich. 414, 26 N. W. 656; *Detroit Stove Works v. Osmun,* 74 Mich. 7, 41 N. W. 845."

Referring to the particular assignment in that case, the court said: (p. 412)

> "It is drafted ingeniously and presents a comprehensive scheme for the administration of the trust property. It appears to us that it creates a practical and workable trust, and we assume that its use is often resorted to by adjustment bureaus acting in the interests of creditors. The principal advantage to be derived from such an instrument is the probable retention of the business as a going concern and the maintenance as an asset of its good will; and in addition thereto it affords an opportunity for payment of claims of creditors in full."

In *Plewa v. St. Joseph's Congregation,* 153 Wis. 276 at 280 (1913) it was directly held that voluntary assignment was not void being saved by this provision in 128.06 added by Chapter 334, Laws of 1897 which was upheld.

It is thus apparent that the Wisconsin court has repeatedly and necessarily held that the provisions of Section 128.06 here in question are separable and are in force regardless of the recognized suspension of other provisions in the chapter including insolvency and discharge provi-

sions introduced by the same act of 1897 which introduced this saving clause into Sec. 128.06.

In 1913 (Ch. 270) the Bulk Sales Law was enacted (Sec. 241.18–19, Stats. 1929) making any transfer of goods, merchandise, etc., otherwise than in the ordinary course of trade conclusively fraudulent as to creditors unless certain requirements were complied with. But the statute was expressly declared not to apply to

> "or to, or by, any person to whom any such property may in good faith be transferred or assigned, in trust for the creditors of such transferor or assignor, for the purpose of liquidating the debts of the latter."

The above indicates plainly that the legislature looked with favor on such assignments and regarded the provisions as to vountary assignments and their administration as in force.

In *Hazelwood v. Olinger Building Dept. Stores, Inc.,* (Wis. 1931) 236 N. W. 591 it was held that Wisconsin statutes 286.10–11 providing for distribution of assets of insolvent corporation against whom execution has been returned unsatisfied and providing for no discharge, was not superseded by the Bankruptcy Act. The court said: (p. 592)

> "Plaintiff has capacity to sue if he has title to the property in question. The appealing defendants predicate their position upon *International Shoe Co. v. Pinkus,* 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318. This case no doubt came as a surprise to a good many lawyers. While it had everywhere been freely conceded that the Bankruptcy Act was paramount to the insolvency laws of the state, it had been generally thought, since the decision of *Boese v. King,* 108 U. S. 379, 2 S. Ct. 765, 27 L. Ed. 760, that a state assignee took title and might proceed until his authority was superseded by the invocation of the provisions of the federal Bankruptcy Act. It is held, however, in *In-*

ternational Shoe Co. v. Pinkus, that, where the property is impounded under a state law which provides not only for its pro rata distribution among the creditors as far as it will go but all claims filed are subject to be discharged upon the application of the bankrupt, the state law is entirely superseded, and that an assignee under the state law taking under such a statute takes no title as such.

In response to the argument made by counsel for appellants, it should be said that there is a fundamental distinction between the law of Arkansas as stated in the opinion of the court in *International Shoe Co. v. Pinkus* and the law of this state. In the matter of *Voluntary Assignment of Tranowski,* 191 Wis. 279, 210 N. W. 836, 49 A. L. R. 686, it was held that the right to make a voluntary assignment for the benefit of creditors is a personal right inherent in the ownership of property, and existed at common law independent of the statute; that, while the discharge of a bankrupt from his debts constitutes the very essence of the Bankruptcy Law, the discharge of a debtor is no part of an assignment law, that part of the chapter relating to discharge is entirely superseded by the federal act, and has, under present conditions, no efficacy; and, further, that a creditor filing his claim and accepting his pro rata share of the proceeds under a voluntary assignment does not waive his right to object to the debtor's discharge. As a condition of filing a claim under the Arkansas statute, the creditor was required to agree that payment of a pro rata share of the assets of the insolvent's estate should discharge his claim. It is hardly necessary to point out the wide difference between the statute of Arkansas and that of Wisconsin as construed by this court. Upon the general question what state laws are superseded by the Bankruptcy Act, see *Stellwagen v. Clum,* 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507, *Old Town Bank of Baltimore v. McCormick,* 96 Md. 341, 53 A. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; *Pelton v. Sheridan,* 74 Or. 176, 144 P. 410; *Mayer v. Hellman,* 91 U. S. 496, 23 L. Ed. 377.

> **Even if this were not true, still the contention of the appellants must fall in this case. The plaintiff, Hazelwood, was appointed as receiver of an insolvent corporation. This is a power inherent in equity courts, and does not depend for its vitality upon any provision of the statute. The procedure in cases of this kind is regulated by sections 286.10 and 286.11. These sections, however, do not create the remedy. It cannot be contended that the enactment of the federal Bankruptcy Act suspended the power of courts of equity in the several states. No provision is made anywhere for the discharge of an insolvent in proceedings of the kind instituted in this case. So that, in any event, the plaintiff might properly have maintained this action."**

The case of International Shoe Co. v. Pinkus, 278 U. S. 261 considered.

The above decision held only that an individual creditor who could not and did not invoke bankruptcy proceedings could not be coerced by a state law into consenting to a discharge as a condition of sharing in assets conveyed by a voluntary assignment. The present case is just the opposite. Even in that case the decision was reached by a majority with Justices McReynolds, Brandeis and Sanford dissenting. That the view of the majority was controlled by the inseparable discharge feature and was limited to that appears from the entire decision. We particularly call attention to the following excerpts:

At p. 264 this court pointed out that the Arkansas Supreme Court had construed the statute as an insolvency law.

At p. 264 the court particularly comments on the provision of the Arkansas law as applied by the state court whereby the creditor must consent to discharge in order to participate and the court then cites *Mayer v. Hellman,* 91 U. S. 496 and other cases including the Wisconsin deci-

sion in *Segnitz v. Garden City etc. Co.*, 107 Wis. 171 which cases make the very distinction as to discharge relied on by Wisconsin Supreme Court in the present case.

At page 265 this court said:

> "Congress did not intend to give insolvent debtors *seeking discharge,* or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws." (Italics ours)

In present case the assignor has never asked for discharge and obviously cannot get it under Wisconsin law.

And at p. 266 the court said:

> "But the property was not handed over simply for the purpose of the payment of debts *as far as it would go;* it was transferred pursuant to a *statute and decree imposing conditions intended to secure the debtor's discharge.* As its claim was less than $500, plaintiff in error could not invoke the jurisdiction of the bankruptcy court without cooperation of other creditors. It was shown by insolvent's petition that his property was less than one-third of his debts. The amount remaining after deducting his exemption and the costs was not sufficient to pay 20 per cent of the claims. All creditors except plaintiff in error agreed fully to release insolvent in consideration of the distribution directed by the decree. And, as their claims were much in excess of the fund, *plaintiff in error could have obtained nothing on account of its claim without giving insolvent a full release.*" (Italics ours)

And at page 268 the court stated:

> "And, as the passage of the Bankruptcy Act superceded the state law, at least in so far as it relates to the distribution of property and *releases to be given,* plaintiff in error is entitled to have its judgment paid out of the fund in the hands of the receiver." (Italics ours)

We respectfully submit that there is nothing in above case which questions the correctness of the judgment here under review. On the contrary the whole decision supports the validity and enforceability of a separable and by the state court separated provision of law relating to the execution and effect of voluntary assignments. We respectfully submit that neither the statutory provision nor the judgment here involves any encroachment by the State of Wisconsin into a field occupied by the Federal Congress but on the contrary occupies only a field which constitutes a recognized, valuable and appropriate field for state authority.

Respectfully submitted,

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